STATE OF MICHIGAN

COURT OF APPEALS

JUDITH UNIS and RONALD UNIS, Individually, and as Next Friends of ALAN MICHAEL UNIS,

Plaintiffs/Appellants/
Cross-Appellees,

and

LISA LYNN DROUILLARD,

Plaintiff

v

THERESA WHEELOCK, Personal Representative of the Estate of MARK ALLEN FIX,

Defendant,

and

VERNOR FOSTER, a/k/a VERNON FOSTER, BENNY PAUL VIGILANTI, and ROBERT L. SELL,

Defendants,

and

R.J. RECREATION, INC. and SULTANA PAR 3 INC.,

Defendants/Appellees/
Cross-Appellants.

UNPUBLISHED
May 23, 1997

No. 184661
LC No. 9301976-NI

JUDITH UNIS and RONALD UNIS, Individually, and as Next Friends of ALAN MICHAEL UNIS,

Plaintiffs-Appellants,

v

No. 184662
LC No. 92-205281-NI

THERESA WHEELOCK, Personal Representative of the Estate of MARK ALLEN FIX, Deceased,

Defendant-Appellee,

and

ROBERT FIX, IMPERIAL HOME IMPROVEMENT, and FIXVILLE, INC.,

Defendants-Appellees,

and

VERNOR FOSTER, a/k/a VERNON FOSTER, BENNY PAUL VIGILANTI, and ROBERT L. SELL,

Defendants,

and

R.J. RECREATION, INC. and SULTANA PAR 3 INC.,

Defendants-Appellees.

JUDITH UNIS and RONALD UNIS, Individually, and as Next Friends of ALAN MICHAEL UNIS,

Plaintiffs,

and

LISA LYNN DROUILLARD,

Plaintiff/Appellant/
Cross-Appellee,

v

No. 184766
LC No. 93-301976-NI

THERESA WHEELOCK, Personal Representative of the Estate of MARK ALLEN FIX, Deceased,

Defendant,

and

VERNOR FOSTER, a/k/a VERNON FOSTER, BENNY PAUL VIGILANTI, and ROBERT L. SELL,

Defendants,

and

R.J. RECREATION, INC. and SULTANA PAR 3 INC.,

Defendants/Appellees/
Cross-Appellants.

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

PER CURIAM.

In Docket No. 184661, plaintiffs Judith and Ronald Unis (the "Unis plaintiffs") appeal as of right the trial court's order granting summary disposition in favor of defendants R.J. Recreation, Inc., and Sultana Par 3, Inc. (the "R.J. Recreation defendants"). In Docket No. 184766, plaintiff Lisa Drouillard appeals as of right the trial court's order granting summary disposition in favor of the R.J. Recreation defendants. In both cases, the R.J. Recreation defendants cross appeal the trial court's order denying their motions in limine. In Docket No. 184662, the Unis plaintiffs appeal as of right the

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* Circuit judge, sitting on the Court of Appeals by assignment.

trial court's order granting summary disposition in favor of defendants Robert Fix, Imperial Home Improvement, and Fixville, Inc. We affirm in part, reverse in part, and remand.

This case arises from a traffic accident that occurred at the intersection of Pennsylvania and Racho Roads in Brownstown Township. The intersection was controlled by a flashing yellow light on Pennsylvania Road and a flashing red light on Racho Road. Alan Unis and Lisa Drouillard were traveling east on Pennsylvania Road in a Toyota Celica. At the same time, Mark Allen Fix was traveling north on Racho Road in a pick-up truck. Fix ran the red light and collided with the Celica. Alan Unis suffered multiple injuries as a result of the collision. Fix was pronounced dead at the scene.

The Sultana Par 3 golf course was located on the southwest corner of the intersection. The golf course was owned by defendant R.J. Recreation, Inc., and operated by defendant Sultana Par 3, Inc. Plaintiffs filed suit against the R.J. Recreation defendants, alleging that the driver of the Celica was unable to see the Fix vehicle because of vegetation growing on the perimeter of the golf course near the intersection where the accident occurred.

The trial court held that the R.J. Recreation defendants were entitled to summary disposition regardless of whether plaintiffs could establish that the vegetation was a factor in the accident because the negligence of Mark Allen Fix was a superseding intervening cause of the collision. We disagree.

If plaintiffs are able to prove that the vegetation was a cause in fact of the accident, a reasonable trier of fact could conclude that by allowing the vegetation to obscure the vision of drivers traveling east on Pennsylvania Road, the R.J. Recreation defendants enhanced the likelihood that a collision would occur. *Hicky v Zezulka*, 439 Mich 408, 438; 487 NW2d 106 (Brickley, J), 447 (Riley, J) (1992).

The real issue in this case is not proximate cause, but cause in fact; i.e., whether there was any evidence in the record supporting plaintiffs' contention that the vegetation actually played a role in the accident by obscuring the vision of the driver of the Celica. Proof of causation requires both cause in fact and proximate cause. *Skinner Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). A plaintiff must adequately establish cause in fact in order for proximate cause to become a relevant issue. *Id.* at 163. Cause in fact requires showing that the harmful result would not have occurred "but for" the defendant's negligent conduct. *Id.*; *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 596; 546 NW2d 690 (1996).

Eyewitness testimony about an accident is not required to establish causation. *Skinner*, *supra*. Although a plaintiff may utilize circumstantial proof to show the requisite causal link between a negligent act and an injury, it is not sufficient for the plaintiff to submit a causation theory that, while factually supported, is at best, just as possible as another theory. *Id.* at 164; *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 483; 531 NW2d 715 (1995). "Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Hasselbach*, *supra*, quoting *Skinner*, *supra* at 164-165.

We find that the proofs plaintiffs submitted in support of the theory of causation were sufficient to preclude summary disposition in favor of the R.J. Recreation defendants. Regardless of the fact that

neither Drouillard nor Alan Unis are able to remember the collision, other evidence was presented that raises plaintiffs' theory to something beyond mere speculation.

Relevant with regard to the issue of causation is the deposition testimony of James Sacilowski who was approximately 150 yards behind the Celica. Sacilowski testified that he saw the Fix vehicle disappear behind the vegetation on the golf course and that the truck did not come into view again until approximately one second before the collision. Defendants argue that Sacilowski's testimony does not support plaintiffs' theory of causation because it proves that the Fix vehicle was visible to drivers traveling east on Pennsylvania Road. We disagree. Merely because Sacilowski knew that the Fix vehicle was approaching the intersection does not prove that that the driver of the Celica was aware of that fact. Moreover, whether the driver of the Celica was aware of the presence of the Fix vehicle is not necessarily determinative with regard to the issue of causation. According to the Unis plaintiffs' expert, the vegetation created a sight obstruction that impaired the ability of the driver of the Celica to determine whether the Fix vehicle would stop at the intersection.

The affidavit of Thomas Arsenault also supports plaintiffs' theory of causation. Arsenault, a Brownstown Township Police Officer, investigated the accident shortly after it occurred. Arsenault indicates that the vegetation obstructed the line of sight between eastbound Pennsylvania and northbound Racho Roads, thereby creating a hazard for motorists. Arsenault's conclusion, which was based on his experience with the intersection and his investigation of the accident, takes plaintiffs' theory beyond the realm of mere speculation.

Finally, the lower court record contains several photographs of the accident site that depict bushes and shrubs growing along the southwest corner of the intersection. From the photographs, it appears that the vegetation may indeed create a sight obstruction for drivers traveling east on Pennsylvania Road.

The affidavit of Thomas Arsenault, the deposition testimony of James Sacilowski, the expert's opinion and the photographs were sufficient to facilitate a reasonable inference that the vegetation growing on the Sultana Par 3 golf course impaired the ability of the driver of the Celica to avoid the collision. Accordingly, we conclude that the trial court erred in granting summary disposition in favor of the R.J. Recreation defendants.

In their cross appeal, the R.J. Recreation defendants argue that the trial court abused its discretion in denying their motions in limine.

The first question is whether plaintiffs may rely on MCL 239.5; MSA 9.525. This statute provides that private landowners have a duty to cut or trim all hedges and hedge rows along, on or adjacent to a public highway to a height not exceeding four and one-half feet and a width not exceeding three feet.[1]

Violation of a civil statute creates a rebuttable presumption of negligence. SJI2d 12.01; *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991). However, the jury may be instructed on a statutory violation only if the violation is relevant to the facts presented at

trial. *Klanseck v Anderson Sales*, 426 Mich 78, 87; 393 NW2d 356 (1986). This requires a determination that the statute is intended to protect against the result of the violation, the plaintiff is within the class intended to be protected by the statute, and the evidence will support a finding that violation of the statute was a proximate cause of the injury. *Id.* See also the Note on Use for Michigan Standard Jury Instruction 12.01.

The R.J. Recreation defendants contend that plaintiffs should not be permitted to introduce evidence regarding a violation of MCL 239.5; MSA 9.525 because the statute was not intended to apply to modern vehicular travel. We disagree.

There is no legislative history available regarding MCL 239.5; MSA 9.525. By its terms, however, it appears that the statute was intended to prevent vegetation from causing a visual obstruction for travelers on public highways. That is precisely the type of harm alleged by plaintiffs in the instant case. Moreover, although the statute was enacted in 1907, it was recently cited by our Supreme Court. See *Scheurman v Dep't of Transportation*, 434 Mich 619, 634; 456 NW2d 66 (1990). In addition, the statute was the subject of an opinion by the Attorney General addressing the applicability of MCL 239.5; MSA 9.525 to fences. See OAG, 1981-1982, No. 6025 (January 13, 1982). Defendants' other attempts to avoid the effect of the statute are similarly without merit.

Defendants also argue that the trial court abused its discretion in refusing to prohibit the Unis plaintiffs' expert witness from testifying at trial. Although an expert witness need not rule out all alternative causes of the effect in question, there must be an evidentiary basis for the conclusions presented. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498-499; 491 NW2d 243 (1992). Where such testimony is purely speculative, it should be excluded or stricken pursuant to MRE 403. *Phillip v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 412; 516 NW2d 502 (1994).

The R.J. Recreation defendants do not dispute that Peter Cooley's credentials were sufficient to qualify him as an expert under MRE 702. Rather, defendants contend that the trial court should have disqualified the witness because his opinion regarding the cause of the accident was based solely on the affidavit of Lisa Drouillard, an individual who has no memory of the accident. We disagree. At his deposition, Cooley testified that his opinion was based on material provided to him by plaintiffs' attorney, including the original police report, a supplemental police report with drawings and sketches, photographs of the accident site, and various affidavits and depositions.

Defendants contend that Cooley's opinion is without basis because he admitted that he did not know whether the driver of the Celica was able to see the headlights of the Fix vehicle as it approached the intersection. Once again, we disagree. Cooley emphasized that the visibility of the headlights was not determinative with regard to the issue of causation. According to Cooley, the vegetation was a factor in causing the collision because it impaired the ability of the driver of the Celica to perceive whether the Fix vehicle was going to run the red light, not because it prevented the driver of the Celica from perceiving that a vehicle was approaching the intersection. Accordingly, the trial court did not abuse its discretion in denying defendants' second motion in limine.

In Docket No. 184662, the Unis plaintiffs argue that the trial court erred in ruling that Imperial Home Improvement and Fixville, Inc., (the "Fix defendants") were not owners of the pick-up truck under the Michigan civil liability act, MCL 257.401 *et seq*.; MSA 9.2101 *et seq*..[2] Imperial Home Improvement was a home construction corporation. Fixville, Inc. is a wholesale manufacturer of windows owed by Mark's father, Robert Fix.

The civil liability act renders the owner of an automobile liable for its negligent operation by another if such operation is with the express or implied knowledge or consent of the owner. MCL 257.401; MSA 9.2101; *Muma v Brown*, 378 Mich 637, 642; 148 NW2d 760 (1967). MCL 257.37(a); MSA 9.1837(a) defines an owner as "[a]ny person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days." For purposes of § 37(a), an "association" means "a collection of persons who have joined together for a certain object" or "for some special purpose or business." *John v John*, 47 Mich App 413, 417; 209 NW2d 536 (1973), quoting Black's Law Dictionary (4th ed), p 156.

In the instant case, the Unis plaintiffs contend that an association existed between the Fix defendants because there was no clear separation between the activities of Imperial Home Improvement and the activities of Fixville, Inc. Whether Imperial Home Improvement and Fixville, Inc., shared a common purpose becomes relevant only if Imperial can be held liable for the negligence of Mark Allen Fix. After reviewing the lower court record, we conclude that there is no basis upon which to hold Imperial liable as an "owner" under MCL 257.37(a); MSA 9.1837(a).

The truck was titled in the name of Mark Allen Fix, not Imperial Home Improvement. Mark purchased the truck by paying cash and trading in another vehicle he owned. Although the truck was insured by Robert Fix, the Unis plaintiffs have offered no proof that the premiums were paid by Imperial or Fixville, Inc. In fact, Robert testified that family members took turns paying the premiums. There is no evidence in the record suggesting that the truck was operated by anyone other than Mark or that anyone else had the right to use the vehicle.

It is undisputed that Mark used the pick-up truck in connection with his business, Imperial Home Improvement, although Mark was not engaged in business pursuits at the time of the accident. The parties did not cite any authority addressing whether a corporation may be held liable for the negligence of the corporation's sole owner in such a situation. We find that Mark and Imperial did not constitute an "association" for purposes of MCL 257.37(a); MSA 9.1837(a). Such a finding would essentially require the owner of a small business to purchase separate cars, one for personal use and one for business use.

Nor can Imperial Home Improvement be held liable under the doctrine of respondeat superior. Although the pick-up truck contained advertising for Imperial Home Improvement on its side, the evidence establishes that Mark was not acting within the scope of his employment at the time of the accident. *Kester v Mattis, Inc*, 44 Mich App 22, 24; 204 NW2d 741 (1972). Shortly before the accident, Mark had an altercation with his girlfriend, Lisa Short, in the street near his house. Short left and went to her grandmother's house. Short testified that she believed that Mark was attempting to

follow her when the accident occurred. According to Short, Mark was not wearing shoes or a shirt. There is no evidence in the record suggesting that Mark was on his way to install windows at the time.

Because the Unis plaintiffs failed to establish that Imperial Home Improvement was an owner of the pick-up truck, it is not necessary to address the remaining issues. Accordingly, we find that the trial court properly granted summary disposition in favor of the Fix defendants.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Clifford W. Taylor
/s/ Roman S. Gribbs
/s/ Roy D. Gotham

[1] Compare SJI2d 19.09.

[2] In their brief on appeal, plaintiffs also make arguments relative to Robert Fix. However, Fix was dismissed by stipulation of the parties on January 26, 1995.